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SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-836

ILARIO ZANNINO, PETER LIMONE, AND JOSEPH P. BALLIRO,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on November 7, 1972.

The petitioners file herewith a single petition in accordance with Rule 23 (5), their appeals in the lower court having been heard on a consolidated record appendix.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is annexed hereto as an Appendix, commencing at page 38.

The opinion of the United States District Court for the District of Massachusetts denying petitioners motion for new trial is also annexed hereto as an Appendix, commencing at page 49.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on May 9, 1972.

The judgment of the Court of Appeals for the First Circuit was entered on November 7, 1972, and is annexed hereto as an Appendix, commencing at page 48.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

The judgment sought to be reviewed is dated, and was entered November 7, 1972.

Questions Presented

1. What standard must be applied when determining whether newly discovered evidence warrants a new trial?

2. Must a judge disqualify himself whenever he must review or reconsider his own determination of an issue?

Statutes Involved

18 U.S.C.A.

§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C.A.

§ 2314. *Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

. . . . . .

. . . . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Statement of the Case

A. *The Proceedings Below*

This petition for writ of certiorari is from a decision of the First Circuit Court of Appeals affirming a denial

of a motion for new trial on the basis of newly discovered evidence. The motion was filed on September 22, 1971, by the petitioners, Zannino, Limone, Balliro and Strauss.

The case originated with an indictment returned on March 26, 1970, charging Zannino, Limone and Balliro with transporting stolen jewelry in interstate commerce from New Hampshire to Massachusetts. This indictment was later joined for trial with another, similar indictment returned against Strauss on September 10, 1970.[1]

Trial commenced on November 3, 1970, and concluded on November 16, 1970 with verdicts of guilty against all petitioners.

Motions for new trial based in part on newly discovered evidence were filed on November 27, 1970, and, after hearings on November 27, December 7, 8 and 11, 1970, the motions were denied on January 11, 1971.

On January 20, 1971, judgments of conviction were entered and, on June 7, 1971, the judgments were affirmed by the First Circuit Court of Appeals.

Petitions for writs of certiorari were timely filed in the Supreme Court and, on September 22, 1971, while those petitions were still pending, the motion for new trial which is the subject of the present appeal was filed. On October 12, 1971, the Supreme Court denied certiorari.

After the trial court refused to hear the instant motion on various jurisdictional grounds, the Court of Appeals, on November 19, 1971, granted the necessary leave to that court on the basis of the affidavits of Detective Lieutenant James DeFuria of the Massachusetts State Police and Sergeant Richard F. Crowley of the Boston Police Department.

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[1] An earlier indictment, obtained on the basis of the testimony of one Charles Lombardi, naming Zannino, Balliro and a Jacob Maislich as defendants, was dismissed when Erwin Soroko, the witness furnishing the basis for the instant indictments, gave a different date for the offense, removed Maislich as a wrongdoer and added Limone and Strauss.

On December 14, 1971, the trial judge who had presided at the trial and heard and decided the original motions for new trial entered an order pursuant to Local Rule 8(i), determining that

> "hearing before him [of the instant motion] will result in a substantial saving in the time of the whole court and that there is no reason why in the interest of justice hearing should be conducted before another judge." (R. 13).[2]

Hearings were then held on January 3, 10, 12, 14 and 21, 1972. Almost four months later, on May 9, 1972, the trial court entered an order denying the instant motion, with a Memorandum of Decision, from which order this appeal was taken (R. 387).

On November 7, 1972, the Court of Appeals affirmed this order which denied the instant motion.

B. *The Testimony at Trial*

On March 24, 1966, Erwin Soroko and Charles Lombardi committed an armed robbery of Cortell's jewelry store in Boston and escaped with about $146,000 in jewelry, which they hid in a cabin in New Hampshire.

Just a short distance away from Cortell's was the Intermission Lounge, a bar and restaurant owned by the defendant Balliro. Soroko, who was the Government's chief witness and the *only* witness to the corpus delicti, worked as a cook at the Intermission.

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[2] "R." refers to the Record Appendix in the *instant* appeal.
"Orig. R." will refer to the Record Appendix in the *original* appeal.
"Orig. P. R." will refer to the Pleadings Record Appendix in the *original* appeal.
"Tr.", followed by a date will refer to the transcript of that date.
"Tr. Tr." will refer to the trial transcript.

According to Soroko's testimony, "early in the day" on Thursday, April 7, 1966, "around 1 o'clock in the afternoon", at the Intermission Lounge, Soroko promised Balliro a share of the proceeds if Balliro would find a buyer for the jewelry. Balliro said that he would go downtown to talk to Larry (the petitioner Zannino), and then left. (Orig. R. 22-23).

"Somewhere around half an hour to an hour later," Balliro returned to the Intermission and told Soroko that Larry was still interested. Soroko said that he wanted to talk to Larry personally. Balliro then made a telephone call. (Orig. R. 24).

"About an hour later" or "within 3 or 4 o'clock", Zannino and Limone arrived at the Intermission. Balliro was present. Zannino said he was interested in buying the jewelry. Soroko said he wanted a jeweler to look at it. Limone interrupted to tell Soroko not to worry about the money. Zannino said he had a man to look at the merchandise. Then he said, "Let me go back downtown and I'll get it to you." According to Soroko, "that was the whole conversation." (Orig. R. 25-26).

"Within an hour" after Zannino and Limone left, or "around 5 o'clock in the afternoon", at the Intermission, Balliro told Soroko that Zannino had called to say that he located his man, who was willing to look at the stuff, and that all should meet at the Intermission at 6:30 o'clock[3] on the following morning.[4] (Orig. R. 28).

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[3] Why Zannino, who did not know where the jewelry was stored, should have chosen this odd hour is left unexplained by Soroko's testimony.

[4] Retired FBI agent William T. Boland, called by the defense, testified that, on this very day, at the Intermission, he interviewed Balliro. The interview began at some time between 1:00 and 1:30 p.m. and lasted about an hour. They did not part company during the hour. During the course of the interview, Balliro stated that he thought Soroko had possibly participated in the robbery, although Soroko had never mentioned it to him. (Orig. R. 248-252).

At the appointed hour on the next morning, Friday, April 8, 1966, Soroko, Balliro and Strauss met at the Intermission and drove off to New Hampshire, where a price of $60,000 was agreed upon. The three men then returned to Boston with the jewelry, arriving in the vicinity of the Intermission "around 2 o'clock sometime." (Orig. R. 29-31, 34-36).

The agreed price was paid in two installments, one during each of the next two following weeks. Both payments were made to Soroko with Zannino, Limone and Balliro present. On the first occasion, according to Soroko's testimony, Limone handed Soroko the money and, on the second occasion, it was Zannino who handed it over. (Orig. R. 40-41, 43-44).

C. *The Testimony at the Original Post-Trial Hearings*

At the original hearing on the motion for a new trial, Boston police detectives George Timmons and Elmer Brooks testified that, on April 7, 1966, they left the Boston Municipal Court at about noon (Orig. R. 541), returned to the Division 2 Police Station (then located on Milk Street on the water side of Atlantic Avenue) (Orig. R. 541, 564), had lunch (Orig. R. 542, 564), obtained an unmarked police car (Orig. R. 543, 564), drove over to Blackstone Street (Orig. R. 543, 564), and there interviewed Murray Alpert, the owner of the Buy-Rite, who stated that Soroko was expected momentarily to pick up a canned ham (Orig. R. 543). They then returned to their car to await Soroko's arrival (Orig. R. 544).

After sitting in the car for "quite awhile" (Orig. R. 544), Timmons saw Soroko in a Falcon passing around the unmarked police car. He could get only the first three numbers of the Falcon and jotted them down. The Falcon angle-parked with its rear end toward the meat company.

Soroko then entered the store. When he returned to the Falcon, Detective Brooks left the police car and engaged him in a short conversation. When Brooks returned to the police car, he was asked by Timmons whether he got the whole registration number of the Falcon. Brooks said that he did not. The officers then tried to follow Soroko, but were unable to do so because of the heavy traffic. (Orig. R. 544-545, 559-562, 657).

Timmons further "testified that he observed Soroko's car for approximately thirty minutes" (Orig. R. 550).[5]

State Police Detective Lieutenant James DeFuria testified that the three officers left the Municipal Court "around close to noontime" (Orig. R. 573) and that he saw Soroko on Blackstone Street "anytime after 12 o'clock to 1:00, 1:30 at the latest" (Orig. R. 570). However, he could not remember any of the events which occurred from the time he left court until the time he saw Soroko (Orig. R. 573-576). At that time, all he could say when asked how he fixed the time of the incident was, "Well, I am just going back in my memory on that day. I thought it was early afternoon, after court, sometime shortly after court" (Orig. R. 571). He was able to recall, however, waiting outside the Buy-Rite for 15 or 30 minutes while Brooks and Timmons interviewed Alpert (Orig. R. 574).

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[5] See *United States* v. *Strauss*, 443 F.2d 986, 990 (fn. 4) (1st Cir. 1971), where this Court considered the thirty-minute period significant as demonstrating that Timmons had adequate time to observe the last three digits of the Falcon's registration. But Timmons got the first three digits while the Falcon passed around the unmarked police car (Orig. R. 545). He obviously then started to write in his notebook and, after writing "X48", he looked up to see the Falcon angle-parked at the wrong angle to observe the registration plate. He then left enough blank space to fill in the last three digits and continued to write. When the officers again tried to view the plate, all three officers were back at the unmarked car, 50 to 75 feet away (Orig. R. 544, 560), and the Soroko car was driving forward and out into the traffic, where it was lost to the officers view. (Orig. R. 545, 562, 657).

Murray Alpert, the proprietor of the Buy-Rite Meat Market, testified that Brooks and Timmons spent 5 or 10 minutes in his store browsing around, that Soroko arrived 30 to 45 minutes later, stayed 5 or 10 minutes and then left (Orig. R. 697-700).

Soroko, who was largely corroborated by his wife, testified that he arrived at the Buy-Rite around 11 o'clock in the morning. The latest was 11:15. The very latest was 11:30. It was not as late as 12:00 o'clock. (Orig. R. 630-631). He spent 15 or 20 minutes at the Buy-Rite (Orig. R. 628) and then made a 15 or 20 minutes' trip to Joanne's home (Orig. R. 634). Joanne's two sons were on their school luncheon recess. Soroko was present while Joanne made them sandwiches and they ate. She made coffee for herself and Soroko. After he finished his coffee, he stayed "around 15 or 20 minutes" and left. (Orig. 634-639).

Soroko further testified that he then went from Joanne's home to the Intermission where he met Zannino and Limone. He did not leave the Intermission to go back to the Buy-Rite. (Orig. R. 629).

Robert Duke, the principal of the school attended by Joanne's children, testified from his records that the children were dismissed for lunch at 11:45 a.m. and returned at 12:45 a.m. (Orig. R. 709-710).

D. *The Testimony at the Instant Post-Trial Hearings*

(1) *Sergeant Crowley:*

The Affidavit of Detective Sergeant Richard F. Crowley of the Boston Police Department, dated November 11, 1971 (R. 14-15), was accepted by the trial court as his direct testimony (R. 59) and the affiant was then subjected to cross-examination by the Government.

In his affidavit, Crowley swore that he left the court-

house with Lt. DeFuria around noontime or shortly thereafter and walked with him down Pemberton Square, Court Street, State Street and then the two turned right at the Custom House where they "zig-zagged" to the Radar Restaurant at the corner of Milk Street and Atlantic Avenue. Crowley declined DeFuria's invitation for lunch. DeFuria entered the restaurant and Crowley crossed over Atlantic Avenue to the station house, which was further down on Milk Street. Later, DeFuria rejoined Crowley in the latter's office and they chatted a short while until Detectives Brooks and Timmons arrived. Crowley gave the three detectives permission to use an unmarked car and the three then left his office. Crowley's estimate of the total time that elapsed from the moment he and DeFuria left the courthouse until the time that DeFuria, Brooks and Timmons left his office was between one hour and one and one-half hours (R. 14-15).

On cross-examination, Crowley testified that he was a Detective Sergeant and had been with the Boston Police Department for thirty-five years (R. 31). Prior to Lt. DeFuria speaking with him by telephone on July 10, 1971, about the events of April 7, 1966, he would say he had no memory of the events of April 7 "because I never even thought about it" (R. 30). When DeFuria called him on July 10, 1971, Crowley did have "partial recall" (R. 30).

The witness was quite sure that he walked with DeFuria down Court Street to State Street, by the Custom House, and then catty-cornered on to Milk Street, where they proceeded to a restaurant and Crowley, declining DeFuria's invitation to lunch, left him at the lunchroom (R. 33). However, the witness agreed he had no recollection of taking that specific route, but based his testimony on the fact that this was the most direct route and the one he always took (R. 33-35).

Outside of leaving the court about twelve noon, the wit-

ness never looked at a clock (R. 35-36). In December, 1970, when asked when he left court on April 7, 1966, he could very well have told FBI agent Irvin that he had no memory "because I didn't give any thought then any more than I can say what case I got through in any court in 1966" (R. 38).

The witness did not remember where he ate or how he got to court or what time he arrived at court on that day. He did wait "quite a long time" for the case to be heard. (R. 38-39).

As to March 31, 1966, Crowley remembered the Lombardi "hearing" of that date (to be distinguished from the trial of April 7, 1966), only vaguely (R. 39-40).

The witness was quite sure that he and DeFuria left Detectives Brooks and Timmons behind at the courthouse so that the latter two could arrange fees for the witnesses (R. 40-41).

Crowley further testified that he was not confusing the events of March 31 with those of April 7, 1966, because the latter date was the only date DeFuria ever testified in a criminal case prosecuted by Crowley. He could not have left with DeFuria on March 31. (R. 41-42).

He then testified that the case could not have concluded as early as 11:45 a.m. His basis for this testimony is his conversations with Brooks, Timmons and DeFuria and "the fact that it was lunchtime and we were at this particular lunchroom at about 12:15 or thereabouts". However, he testified that his affidavit was not based on what they told him but that, after conferences with the three detectives, things came back to his mind. (R. 43).

Crowley had no memory about March 31, but there was no confusion in his mind between that date and April 7, 1966, because the case was continued on the earlier date and there were no witnesses; and the only time that he

prosecuted a case where Lt. DeFuria was a witness was on April 7 (R. 43-46).

The witness could not remember what type of clothing he wore on April 7, 1966 (R. 46).

On re-direct examination, Crowley testified, that there were three court proceedings: (1) The issuance of the complaint, (2) the arraignment and continuance of March 31, at which absolutely no witnesses were heard and (3) the hearing of April 7, 1966, which was the only time in Sgt. Crowley's whole lifetime that DeFuria was a witness in a case prosecuted by Crowley (R. 50).

Moreover, although the witness could not recall specifically the walk down State Street, he testified that he specifically recalled the trip down India Street where he zigzagged toward Milk Street, specifically recalled being asked by DeFuria to join him for lunch, recalled DeFuria entering the restaurant, specifically recalled going over himself to the stationhouse, remembered DeFuria rejoining him in his office on the second floor of the stationhouse, and knew that they talked at that time but could not remember the subject of the conversation (R. 50-52).

Crowley further testified on re-direct that there was a robbery at the Collateral Loan Company around October, 1965, and that, for a year thereafter, customers whose property had been stolen came to the police station and, among other things, were advised by Crowley to refer to their homeowners' policies (R. 52-55).

The witness also recalled that he and DeFuria were then joined by Brooks and Timmons, but did not recall any conversation except that he gave them permission to use an unmarked car, which was then available (R. 55-56).

He further recalled a conversation on April 7 with Judge Adlow at the bench in which the latter explained why he was dismissing the lesser charges against Lombardi (R. 56-57).

The witness then testified that, from the moment that the hearing concluded through the conference with Judge Adlow, the wait in the corridor, going down the elevator, the walk to the Radar Lunch, the moment of the invitation, the separation from DeFuria, the return to his office at the stationhouse, being rejoined by DeFuria, the chat with DeFuria, being rejoined by Brooks and Timmons, the chat with the latter two detectives, the turning over of the keys, to the time they left his office, there was a lapse of time of about one hour and fifteen minutes to one hour and thirty minutes (R. 57-58).

On re-cross examination, the witness testified that not more than five minutes elapsed from the conclusion of the case to the time he left the courthouse; that the walk to the restaurant took 15 minutes, although he very well could have told the FBI it took 10 minutes; that DeFuria arrived in his office 20 to 30 minutes later; and that there was a considerable waiting period for Brooks and Timmons to return from the courthouse. (R. 62-63).

(2) *Lieutenant DeFuria:*

Detective Lieutenant DeFuria's affidavit of November 16, 1971 (R. 16) stated that, on refreshing his memory since his testimony of 1970, he now recalled the conference with Judge Adlow at the conclusion of the case, talking afterwards in the corridor with Lombardi's counsel, and leaving with Sgt. Crowley while Brooks and Timmons stayed behind to attend to the witnesses. The hearing concluded at noon and they left 10 minutes later. (R. 16-17).

He recalled the walk down State Street, turning right at the Customs House, looking up to its tower, commenting about the way that the parked cars were clustered at its base, asking Crowley about the odd appearance of the

old Grain Exchange Building, commenting about the new location of Pattern's Restaurant, turning left down Milk Street, being joined by Detective McMahon at the Radar Restaurant and separating from Crowley to have lunch with McMahon. The walk took about fifteen minutes. (R. 17-18).

After lunch, DeFuria rejoined Crowley in the latter's office at the stationhouse. A woman came in to inquire about a pawn shop robbery. Then Timmons and Brooks arrived. The four officers chatted for a while and then Brooks, Timmons and DeFuria decided to interview Joanne in Winthrop and Murray Alpert at the Buy-Rite. However, they had to wait because an unmarked car was not immediately available. They left the stationhouse sometime between 1:45 and 2:00 p.m. (R. 18).

Timmons drove to the Buy-Rite with Brooks at his right and DeFuria in the rear seat. They parked about 50 to 75 feet from the Buy-Rite. DeFuria waited in the car while the other two went into the Buy-Rite and returned about 15 minutes later. His best memory is that Timmons joined him in the rear seat. They waited 30 minutes or more until Soroko and Joanne drove up and angle-parked near the Buy-Rite. DeFuria could catch only the first three digits of the Soroko car, which he read off to Timmons. Soroko went into the Buy-Rite and came out about 10 or 15 minutes later. (R. 19).

Brooks had already left the car and was talking to Joanne when Soroko returned to his car. Brooks returned to the unmarked police car. They tried to follow the Soroko car but could not do so because of the traffic. All told, the officers were at the Buy-Rite for more than an hour. (R. 20).

DeFuria concluded his affidavit by conceding that his memory now coincided with the diary entry that the encounter with Soroko occurred at 3:30 p.m. (R. 20).

On cross-examination by government counsel, DeFuria testified that, on the date of the trial court's first decision, denying the motion for new trial, January 11, 1971, he told Mr. DiMento, counsel for Zannino, that he could not remember any more of the events of April 7 than he had already testified to. He also testified that, in October, 1970, he had told government counsel that the Buy-Rite incident occurred at around twelve to twelve thirty. Timmons was present at the time and said that it must be so if DeFuria said so. (R. 66-67).

It was reading the name of Sgt. Crowley in the transcript of the first hearing that triggered DeFuria's memory of the walk back to the stationhouse with Crowley and the events that followed. This happened in February, 1971, while he was convalescing from a broken ankle. However, he did not tell DiMento about it until June, 1971. He had asked DiMento to send him the transcript when the latter called him on January 11, 1971. Although DiMento called him continuously after sending him the transcript, he did not reveal his refreshed testimony until June because he did not want to get involved and knew the repercussions that would ensue. (R. 67-71).

On October 21, 1971, DeFuria told FBI agent Irvin that he did not remember who drove the car but that Timmons was in the back seat when he wrote down Soroko's registration. Anything to the contrary in his affidavit as to who was driving is a mistake, caused by the fact that Timmons always drove the car. (R. 75-76).

On the morning of April 7, DeFuria drove in his own car directly from home to the Division 2 stationhouse, arriving between 8:30 and 9:00 o'clock. A police car drove him to the courthouse. He did not use his own car for that trip. He could not remember where in the vicinity of the stationhouse he parked his own car. He left the courthouse with Sgt. Crowley and next saw Brooks and Timmons at

Division 2. His best memory was that they walked directly to Division 2. The walk took 15 or 20 minutes. The earliest he could have left the courthouse was 11:45 a.m. (R. 77-80, 85-86, 92, 106-107).

DeFuria's first personal meeting with DiMento was on June 18, 1971, at a restaurant near the latter's office (R. 334) and the Customs House. They had steak dinners, paid for by DiMento (R. 80-83).

On June 18, 1971, DiMento asked DeFuria to talk to Crowley and to see if he, DeFuria, could refresh Crowley's recollection. Between June 18, 1971, and August 31, 1971, when DeFuria finally spoke to Crowley, DiMento called DeFuria repeatedly to determine if DeFuria had contacted Crowley. (R. 87-89).

When DeFuria finally spoke with Crowley, the latter said, "Gee, you are right. This is a serious matter", to which DeFuria responded, "I know it is." (R. 90). When speaking with Crowley, DeFuria narrated to Crowley some of the events remembered by him and Crowley remembered the same things. Neither man remembered exact times. (R. 92-94).

In his interview with DiMento, DeFuria gave DiMento estimates of how long each incident took (R. 101-103). DeFuria was in Crowley's office better than half an hour, but he gave the FBI a conservative time of 15 to 20 minutes (R. 105-106).

DeFuria's diary for April 7, 1966, was admitted as Exhibit 1. It read as follows:

"G.H.Q. to Boston Municipal Court
Charles Lombardi Trial
"118 Blackstone St. Boston
Talked to Murray Alpert re
knowledge of crime
"Dist. #2 B.P.D. & return
12 miles" (R. 121).

DeFuria's semi-monthly report (Exhibit 2) showed that, on April 7, 1966, he visited the Municipal Court, 118 Blackstone Street and the Division 2 stationhouse and, on the reverse side, the report showed G.H.Q. to Boston, 3 stops and return. The 3 stops are those shown on the front page, but do not mean that he used his own car to go to Blackstone Street. The 12 miles recorded for use of his own car is the standard figure for a single round trip between State Police G.H.Q. and Division 2.[6] (R. 123-127).

DeFuria further testified that, on June 18, 1971, the evening on which his dinner had been paid for by DiMento, he had listed a reimbursable supper expense of $2.50. Exhibit 5 showed that for the period June 16 through June 30, 1971, while assigned to Suffolk Downs, DeFuria had, for every day except his days off, uniformly reported a working day from 8:45 a.m. to 9:00 p.m., reimbursable mileage expense of $2.60 between G.H.Q. and East Boston and reimbursable supper expense of $2.50. He further testified that this was done on orders of his captain in order to help compensate DeFuria for the lack of overtime pay during this assignment at the race track and that his captain had confirmed this explanation to the government. (R. 130-135).

Still on cross-examination, DeFuria testified that he remembered what he wore on April 7, 1966, remembered admiring Sgt. Crowley's coat on that day and remembered what he wore when interviewed by the FBI (R. 135-136).

DeFuria, when again asked to state the route he took from the courthouse to Division 2, repeated his earlier

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[6] The trial court admitted the semi-monthly report into evidence on the prosecutor's assertion that it showed DeFuria claimed mileage for 3 stops. The court observed, however, "I don't think it matters. I don't think it proves anything" (R. 129). Moments later, the court said, "Well, put it in [*i.e.*, the semi-monthly report], although I don't think it adds anything" (R. 129).

testimony. When specifically asked if he stopped "for a paper or anything", he stated that he did not remember. However, in his discussions with Crowley, the latter had mentioned something about stopping at a drugstore, but DeFuria could not honestly remember it and had to say no. (R. 136).

Government counsel then took from his file a three-page document (Exhibits 6-A, 6-B and 6-C), dated April 7, 1966, listing fees paid at Boston City Hall on that date to state witnesses. The list showed the court and number of the case in which the witness testified, the amount of the fee and the witness's signature acknowledging receipt of payment. The document bore Lt. DeFuria's signature and proved that he had stopped on his walk down Court Street at the City Hall to collect his fee for testifying in the Lombardi case. (R. 137).

Following DeFuria's name were the names of six witnesses in the Lombardi case, including Timmons (who received payment on that date for an appearance in a different case). DeFuria remembered Timmons in City Hall, but did not remember collecting his money. He did not remember walking with Timmons to City Hall nor seeing Brooks there. He did not go to 118 Blackstone Street directly from City Hall, but went back to District 2. (R. 137-140).

On questioning by the court, DeFuria said that he spoke personally with DiMento on June 18 and August 31, 1971, and again on the day before he signed his affidavit. DiMento then typed up the content of this last interview and DeFuria came into his office on the next day, November 16, 1971, to sign it. Between August 31 and November 16, 1971, DeFuria talked by telephone many times to DiMento concerning the department rule against signing affidavits. (R. 141-144).

Also on questioning by the court, DeFuria testified that

he had a conversation with Soroko sometime during the trial. The conversation took place in the prosecutor's office. DeFuria asked Soroko what time the Buy-Rite incident occurred. Soroko said it was "about 11:30 or so, 11. Before noon". DeFuria said that it could not have been because he was in court that day. Soroko said that he remembered it his way. DeFuria replied that it could not be because of the court appearance and stated that it was more in the early afternoon, 1:30 or 2:00 o'clock. Soroko said it had to be around 12:00 or before 12:00, but it could have been 12:30. (R. 144-147).

When DeFuria testified at the first post-trial hearings in 1970 that the incident occurred at 1:30 at the latest, he gave that time because all he could associate the incident with was that it was after court (R. 148).

On redirect examination, DeFuria testified that he remembered two further things around November 16, 1971, that he had not previously recalled: (1) A woman coming into Crowley's office while he had stepped out and DeFuria advising her to collect on her home insurance policy for the loss of property in a pawn shop robbery and (2) talking about the Lombardi case with a Worcester newspaperman during the morning of April 7, 1966, at the courthouse, because the Boston newspapers were on strike (R. 149-151).

When the prosecutor asked DeFuria and Timmons, in the prosecutor's office, about the time of the Buy-Rite incident, Timmons said to DeFuria, in the prosecutor's presence, that, if he had his notebook, he could be sure of the time, but nobody asked Timmons to get his notebook (R. 151).

On further redirect, DeFuria testified that the procedure for collecting a witness fee was to go to the clerk's office on the fourth floor of the courthouse, which was also the floor on which the Lombardi hearing was held, and there

to pick up a pink slip. This had to be done after the appearance occurred for which payment was being requested. DeFuria's practice was to then walk down to Court Street and enter City Hall through the Annex, going up by elevator to the Treasurer's office on the second floor of the main building, where the witness list was signed and the money received in exchange for the pink slip. State police officers are allowed to collect witness fees for Municipal Court, as well as Superior Court, appearances, because they do not receive overtime pay. (R. 155-160).

DeFuria then stated on redirect that he now recalled the Lombardi witnesses in line behind him and Crowley being with him (R. 164-166).

On recross, DeFuria stated that it was during the recess that he recalled the Lombardi witnesses coming in after him to collect their fees. However, he could not actually remember Crowley being right there in the room with him while he was collecting his fee, but did remember walking down State Street with Crowley. (R. 166-169).

On further redirect, DeFuria stated that he did not tell the Government about his meeting with DiMento on June 18, 1971, and his refreshed recollection because he was worried about repercussions from changing his testimony. He feared that he would be thought of as some kind of criminal by testifying on behalf of the defendants and avoided DiMento during the summer of 1971. (R. 171-172).

(3) *Detective Brooks:*

Detective Elmer V. H. Brooks, who had testified once at the first hearings in 1970, was called by the defendants and testified that he was now retired from the Boston Police Department, having retired four days after his previous testimony. He stated that, after attempting to interview Joanne and returning to the unmarked police

car, he looked into the car and Timmons asked him whether he got the last three digits of the Soroko car. At that moment, Timmons was writing in his pocket diary. Brooks' memory was "quite clear" on the point. (R. 182-184).

Brooks further testified that, after the Lombardi hearing was over, he took the witnesses to the docket room to get their pink slips. However, before they could receive these slips, the papers would first have to be sent over to the docket room from the courtroom. The whole procedure took 15 minutes. (R. 186-187).

Brooks further testified that he left the courthouse with Timmons, but could not recall Timmons collecting a fee at City Hall. All he could say was that "when we get out that late out of court we stop and have a lunch. It is possible he went in at that time and cashed his slip. I don't know." (R. 189).

Brooks also recalled returning to the station from the courthouse, but could not recall where, or if, he had lunch. Moreover, when he took the unmarked car at Division 2, his purpose was to interview Alpert and Joanne. (R. 190-191).

On questioning by the court, Brooks testified that he could not say what it was that Timmons was writing in his diary at the time Timmons asked whether Brooks got the last three digits (R. 194-195).

On cross-examination, by the government, Brooks testified that he and Timmons left the courthouse together after assisting the witnesses in getting their slips and after going to the supervisor of cases and giving him the dispositions of the various complaints. DeFuria left the courthouse before Brooks and Timmons. (R. 197-198).

On redirect, Brooks stated that, prior to his testimony at the original hearings, he refused to give DiMento any information other than that Soroko was observed in the afternoon (R. 198-199).

(4) *Testimony resulting from disclosure of the City Hall witness list:*

Officer William Keasley of the Boston Police Department, whose name appeared on the fourth line above DeFuria's name on the witness list, was called by the government and testified that, after having his memory refreshed by the FBI from the witness list, he recalled the case for which he received a witness fee on April 7, 1966. The name of the defendant was Dorest. (R. 216-217). He stated that he left the courtroom after the trial court refused to allow a state witness to testify, went from the seventh or eighth floor to the fourth floor to secure his witness fee chit and proceeded to City Hall. It took him five minutes to walk to City Hall. He did not really have a recollection whether he was accompanied by a brother officer. (R. 218-220).

On cross-examination by defense counsel, the witness testified that, two days before, he had told the FBI that, assuming that the jury retired at 11:18 a.m., he received his witness fee about 15 minutes thereafter and could now say the same thing (R. 236-237). He also told Mr. Lane, an investigator for the defendants, that he arrived at City Hall at 11:30 a.m. (R. 238-239).

The government introduced as Exhibit 10 the transcript of the Dorest trial, specifically referring to the notations as to the time that the jury retired and returned its verdict. The transcript showed, at page 77, that the jury retired at precisely 11:18 a.m. (R. 255; Ex. 10).

Officer Wendell T. Wallace, Jr., of the Boston Police Department, whose signature appeared on the witness list right after Keasley's and three lines before DeFuria's, was called by the government and testified that the list was shown to him by agents of the FBI, who also told him the name of the case, and that, as a result, he could recall the case (R. 244-246). He remembered the trial judge re-

fusing to allow the state witness to testify. He also remembered the arguments, the charge and the jury filing out to conduct its deliberations. He then left the courtroom and went down to the prosecutor's office on the sixth floor, where he remained for 5 or 6 minutes. Then he went to the fourth floor to obtain his witness chit and thence to City Hall. He was sure that he went down to the prosecutor's office. He could not remember whether he was accompanied by Keasley. (R. 246-250).

On redirect, Wallace testified that it took 6 or 8 minutes, roughly, to take the elevator from the sixth to the fourth floor, obtain his witness slip, take the elevator down to the street and walk over to City Hall (R. 255).

John E. Cronin, Paymaster in the City Treasurer's office, was called by the government and testified that it takes about thirty seconds to pay a witness presenting a voucher. If five witnesses came in together on the same case, it would take two and a half minutes and, for ten witnesses on the same case, three to five minutes. (R. 257-259).

Richard L. Lotreck, a retired court reporter, was called by the defense and testified that, according to his stenographic notes, he would estimate that one John O'Donnell testified at about 11:00 a.m. for about four or five minutes. (R. 325-330). O'Donnell's signature appears seven lines before Lt. DeFuria on the witness list, Exhibit 6.

According to the affidavit of Official Court Stenographer Germaine Letoile, accepted by the court, the evidence in the Payne and Johnson case concluded at approximately 11:10 a.m. On the basis of her estimate from her notes that Judge Quirico's charge consumed an hour and a half and accepting as accurate Judge Quirico's notation that the jury retired at 1:00 p.m., she estimated that the charge began at 11:30 a.m. and that the time between 11:10 a.m.

and 11:30 a.m. was devoted to arguments of counsel and the morning recess. (R. 21).

Officer John J. Carozza of the Boston Police Department was called by the defense and his unsigned affidavit, attached to DiMento's affidavit of January 20, 1972 (R. 23-27), was accepted by the court as his direct testimony (R. 347, 349). His name appeared five lines above Lt. DeFuria's name on Exhibit 6.

In his affidavit, Carozza stated that he left the trial of the case of Commonwealth v. Payne and Johnson at the conclusion of the arguments and before the court began its charge, in the company of two fellow officers. He obtained his witness chit two floors below and then proceeded with his two companions to the Steaming Kettle Coffee Shop, where they had coffee and cake. They left at approximately noon, just before the lunch crowd began to come in and proceeded a few steps down Court Street and through the City Hall Annex over to the Cashier's office where they cashed their chits. (R. 25-26).

On cross-examination, the witness testified that one half hour elapsed between the time he left the courtroom and the time he collected his fee at City Hall (R. 354). Whenever he had a witness fee to collect, his practice was always to stop first at the coffee shop and have coffee and a muffin (R. 357-358).

Reasons for Granting the Writ

The reasons proposed by petitioners for granting the writ will be stated under each of the headings relating to the respective questions presented.

I. The Trial Court's Findings Were Not Warranted by the Evidence and Were in Direct Conflict With All the Uncontradicted Evidence in the Case, and the Court of Appeals Erred by Affirming the Decision.

The Court of Appeals acceded to the trial court's finding that the refreshed recollection of two police officers, which recollection was supported by City Hall witness lists, was incredible, and cited *United States* v. *Leach*, 427 F.2d 1107 (1 Cir. 1970). *Leach* dealt, in part, with an appeal from a trial court's denial of a motion for judgment of acquittal and new trial. In that case the trial judge was not compelled to consider new evidence but was asked to overrule the jury's verdict. A motion for new trial based upon newly discovered evidence presents a more difficult analytical problem because a judge must consider the new evidence with the old and assess its impact on the jury.

In *United States* v. *Johnson*, 327 U.S. 106 (1946) this Court considered a question similar to the instant and affirmed the decisions of the Court of Appeals and the District Court. *Johnson* considered motions for new trial based on evidence that a government witness had lied. The trial court in *Johnson* gave careful consideration of all affidavits and counter-affidavits, and concluded that none of them showed that the witness perjured himself, therefore the motion for new trial was denied. The *Johnson* case stands for judicial restraint on this question of new trials based upon newly discovered evidence, but it does not compel judicial abstinence by rubber stamping the District Court ruling.

We submit that in the instant case the trial testimony of the Government's chief witness is irreconcilable with the newly discovered evidence, which immediately distinguishes this case from *Johnson*, and therefore would compel a close scrutiny of this new evidence.

The petitioners make the following concessions in order to focus upon the issues which confronted the Courts.

A. ***The Events Described By Officers DeFuria, Crowley And Brooks Are Irreconcilable With Testimony Of Soroko.***

Concession No. 1:

In the first place, accepting the trial court's hypothesis that the recollection of DeFuria and Crowley are true (R. 391), we are willing to concede not merely that "the events described by DeFuria in his testimony might well have consumed much less time than he roughly estimated" (R. 392), but that these events took only *one hour:*

(1) The discussion with Judge Adlow at the bench and the chat afterwards in the corridor with defense counsel.

(2) The obtaining of the pink witness slip by DeFuria.

(3) The wait for the elevator, the descent to the street floor and the walk to City Hall.

(4) The receipt by DeFuria of his witness fee.

(5) The walk down Court, State, India and Milk Streets to the Radar Restaurant.

(6) The chat among Crowley, McMahon and DeFuria outside the restaurant.

(7) DeFuria's luncheon with McMahon.

(8) DeFuria's walk from the restaurant to Crowley's office.

(9) The conversation between DeFuria and Crowley in the latter's office while waiting for the arrival of Brooks and Timmons.

(10) The arrival of Brooks and Timmons and the further conversation among the four officers.

(11) The trip to Blackstone Street.

(12) The interview of Murray Alpert.

(13) The wait for Soroko's arrival.

(14) Soroko's arrival and his conversation with Alpert inside the store.

(15) Soroko's return to his car and the attempted interview by Brooks.

Concession No. 2:

Secondly, we are willing to assume *arguendo* not merely that the Buy-Rite incident could have occurred as early as 1:30 p.m., as the Government asserts in its alternative argument accepting the testimony of DeFuria and Crowley (Gov. Br., p. 24), but that it occurred as early as *noontime.*

Concession No. 3:

Thirdly, we would be willing to concede that, if Soroko arrived at the Intermission not at 2:00 p.m., but even as late as *3:00 p.m.*, there would be ample time for Soroko to have accomplished what he claimed on that afternoon of April 7, 1966 (giving him the benefit, of course, of an assumption that he over-estimated the various lapses of time), namely:

(1) The talk with Balliro about finding a buyer for the jewelry.

(2) Balliro's departure downtown and his return about half an hour to an hour later.

(3) Further conversation with Balliro and the telephone call by Balliro.

(4) The arrival of Zannino and Limone about an hour later and their conversation with Soroko.

(5) The departure of Zannino and Limone; and, one hour later, Zannino's telephone call to Balliro.

Concession No. 4:

Giving due allowance to excusable failures of memory with respect to time periods, the testimony of all five police officers (DeFuria, Crowley, Brooks, Timmons and FBI

Agent Boland) is *not necessarily* irreconcilable with Soroko's *trial testimony.*

It is this last concession which best illustrates defendant's point; namely, however short a period of time could reasonably have elapsed between the conclusion of the Lombardi trial and the Buy-Rite incident and however late in the day Soroko could have arrived at the Intermission to conduct his alleged business there, the testimony of the five officers was irreconcilable with Soroko's trial testimony, *when taken together with his testimony at the first trial hearings and the school records showing the return of Joanne's children to school at 12:45 p.m.*

In other words, the time between 12:45 p.m. and Soroko's arrival at the Lounge was all *dead* time, during which, on Soroko's own positive testimony, none of the described events could have occurred. Accepting the Government's argument that "DeFuria collected his witness fee at Old City Hall at a time closer to 11:30 a.m. than to 12:00 noon" (Gov. Br., p. 25), there was simply not sufficient time for all the events described by DeFuria, Crowley, Timmons and Brooks to occur and still allow Soroko his 15 or 20 minutes with Alpert (Orig. R. 628), his 15 to 20 minutes for the ride to Winthrop (Orig. R. 634), preparation and consumption of lunch by the children and their return to school by 12:45 p.m.

B. *The City Hall Witness List And The Evidence Discovered Therefrom Conclusively Established Soroko's Perjury*

The Government argues that

> "[a]t the conclusion of the original post-trial hearings, the state of the evidence tended to indicate that the 'Lombardi' hearings had concluded at around

> 12:00 o'clock noon. (Orig. R. 541, 573, 575)." (Gov. Br., p. 24)

and that the evidence generated by the City Hall witness list favored the Government because it.

> "tended to establish that the 'Lombardi' hearing concluded well before 12:00 o'clock." (Gov. Br., p. 24)

As a result, the Government concludes:

> "It would appear that DeFuria collected his witness fee at Old City Hall at a time closer to 11:30 a.m. than to 12:00 noon." (Gov. Br., p. 25)

If the Government's premise is correct (*i.e.*, that the evidence at the original new trial hearings proved the Lombardi trial to have concluded at noon), then it would follow that a grievious injustice was done to the defendant by the trial court's first ruling, made on January 11, 1971. If DeFuria did not leave the courthouse until noon, there was simply no way that all the described events which everyone agrees occurred could have occurred in sufficient time for the children to return to school by 12:45 p.m. (even excluding the trip to Division 2). It would be utterly imposible for DeFuria, beginning at noon, to pick up his pink slip, go to City Hall, collect his fee and drive *directly* to Blackstone Street with Timmons and Brooks, and then for the latter two officers to interview Alpert, return to the unmarked car and wait for Soroko's arrival, and, finally, for Soroko to finish his 15 or 20-minute conversation with Alpert, talk briefly with Brooks outside the store, make the 15 or 20-minute trip to Winthrop and watch Joanne prepare lunch and the children consume it in time for their return to school by 12:45 p.m.

What is worse is that, if the Government is correct, the same error was repeated by the ruling now under review, because the witness list in no way made the time of DeFuria's departure from the courthouse any earlier. All it accomplished was to fix a time, *i.e.*, 11:30 a.m., before which it was impossible for the officers to have left the courthouse. In no way did it tend to prove that they, in fact, left at 11:30 a.m., or, even shortly thereafter.

The value of the list to the defendant, of course, was to permit the compelling argument that, even accepting 11:30 a.m. as the earliest possible time for the officers' departure from the courthouse, it was impossible for all the described events to occur before 12:45 p.m. However, even accepting this time not as the earliest limit but as a close approximation of the time DeFuria actually left the courthouse, it was still manifestly quite impossible for all the described events (even excluding the trip to Division 2) to have occurred in sufficient time for the children's return to school by 12:45 p.m.

Despite these apparent contradictions between the events as described by Officers DeFuria, Crowley and Brooks and those events described by Soroko, the trial court denied the motion based upon these findings:

> "(1) That the officers' refreshed recollection was not a real one but a reconstruction of what might have happened if the 3:30 P.M. notebook entry were accurate;
>
> (2) That the facts testified to by the officers did not prove that Soroko had testified falsely when he described the meeting in the lounge on April 7, 1966; and
>
> (3) That refreshed recollection under these cir-

cumstances did not constitute newly discovered evidence."

United States v. *Zannino,* F.2d (1 Cir. 1972)

The Court of Appeals in reviewing the District Court decision did not review its third finding.

We submit that the standards applied by the District Court and affirmed by the Court of Appeals are inconsistent with standards applied in other jurisdictions. In *United States* v. *Strauss,* 443 F.2d 986 (1 Cir. 1971)[7] the Court of Appeals outlined three different standards which are generally applied to motions for new trial.

The majority rule expressed in *Berry* v. *Georgia,* 10 Ga. 511 (1851) grants a motion for new trial when the newly discovered evidence would probably produce an acquittal. In *Larrison* v. *United States,* 24 F.2d 82, 87 (7 Cir. 1928), the Seventh Circuit held that "(a) The Court is reasonably well satisfied that the testimony given by a material witness is false [and] (b) That without it the jury *might* have reached a different conclusion." And the Second Circuit Court of Appeals applies both standards.

In the instant case the trial court questioned the police officers' refreshed recollection and that the chief Government witness Soroko had not been proven false in the *most material* parts of his testimony. The Court made a finding on the weight of refreshed recollection, and determined that even if Soroko lied there was no evidence that he lied in the most material parts of his testimony. We submit that the Court should have considered whether the evidence indicated that Soroko had lied in some parts of his testimony, and, if so, what impact this fact would have on the jury.

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[7] Which considered the petitioner's first motion for new trial.

We submit that the varying standards among the jurisdictions for determining whether newly discovered evidence warrants a new trial is not conclusive to the administration of criminal justice in the Federal Courts; and calls for a decision by this Court.

II. The Right to an Unbiased Judge Is So Much Incorporated Within the Fifth and Fourteenth Amendments, so Protected by Federal Statute and Court Rule and So Much in the Interest of Society that a Waiver of that Right Cannot Be Inferred from the Mere Silence of a Defendant.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way

'justice must satisfy the appearance of justice.' Offcutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13." *In Re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955).

The *Murchison* case is a more dramatic example of the issue arising in this case since the trial judge in *Murchison* was also a one man grand jury which had returned the indictments but the objections are the same: whether a hearing before a judge who has already reached a conclusion on the subject matter of the hearing constitutes a denial of the fair and impartial trial required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Mr. Justice Black delivering the opinion of the Court in *Murchison* recognized that "(a)s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place (at a prior proceeding). His recollection of that is likely to weigh far more heavily with him than any testimony given in the (later) hearing". *Murchison, supra*, at p. 138. Mr. Justice Black further took notice that at various times during the trial the judge recalled the insolent manner of the defendant at the earlier proceeding which fact was not apparent on the record. Thus, ". . . the State (had) the benefit of the judge's personal knowledge while the accused (was) denied an effective opportunity to cross-examine." *Murchison, supra*, at p. 139 .

The First Circuit has recognized this difficulty which faces a defendant who must convince a judge that his conclusions after a prior proceeding were wrong and has recognized that regardless of this difficulty remanding a case to the same district judge created an appearance of unfairness.

In *Halliday* v. *United States*, 380 F.2d 270 (1 Cir. 1967), the Court of Appeals remanded the case to the District Court for further proceedings and directed that a judge other than the trial judge preside. The reasoning of *Murchison* was applied in order to insure ". . . that judicial decision-making not only be fair, but that it so appear to all eyes". *Halliday, supra*, at p. 274. The recent decision of *Mawson* v. *United States*, 463 F.2d 29 decided by the First Circuit Court of Appeals on June 15, 1972, reaffirms this principle that recognizes the difficulty "... for a judge having once made up his mind, to re-sentence a defendant, and both for the judge's sake and the appearance of justice, we remand this case to be redrawn ..." *Mawson, supra*, at p. 31.

In addition to the fundamental right to a new judge dictated by the *Murchison* decision, the Federal District of Massachusetts in its local rules calls for the redrawing of cases which are remanded by an Appellate Court for further proceedings. Rule 8(i) compels a redrawing except in a narrow range of cases where a *substantial* saving of time will result and there is *no reason* why in the interest of justice further proceedings should not be conducted before another judge. The *Murchison*, *Halliday* and *Mawson* cases all indicate substantial reasons why in the interest of justice further proceedings should be conducted before another judge and whether there would be a substantial time saving is clearly in the negative as evidenced by the extensive hearings on the second motion for a new trial.

The Court of Appeals, however, held that by failing to object the petitioners had waived the fundamental right to Due Process and belied their claims of prejudice. The courts have consistently held that waiver of constitutional

rights will not be inferred lightly and prejudice will be presumed from a denial of a fundamental right. There are several cases standing for the proposition that a timely objection to a judge must be raised.[8] But, in *United States v. Amerine*, 411 F.2d 1130 (6 Cir. 1969), the Government contended that Amerine had waived any Section 455[9] objection because he raised the issue at the end of the trial. The Court of Appeals held:

> "Whatever logical force the waiver argument might have otherwise, we believe it is completely negated by the fact that this statute originally required one of the parties to move for disqualification (*see* U.S.C. section 24 (1946) but in 1948 Congress amended the statute, removing this feature entirely. Judicial Code Section 455, 28 U.S.C. Section 455 (1964).
> "As the statute now stands, the duty to disqualify is placed solely upon the District Judge." *Amerine, supra*, at p. 1134.

We submit therefore that Local Rule 8(i) is directed to the District Judge to disqualify himself and does not

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[8] *Goldfine* v. *United States*, 268 F.2d 941 (1 Cir. 1959) cited at pp. 33, 34 of appellee's brief.
Holliday v. *United States*, 380 F.2d 270 (1 Cir. 1967) cited at pp. 32, 33, 36 of appellee's brief.
Palmer v. *United States*, 249 F.2d 8 (10 Cir. 1957) cited at p. 35 of appellee's brief.
United States v. *Meyers*, 381 F.2d 814 (3 Cir. 1967) cited at pp. 34, 35 of appellee's brief.
Walker v. *Bishop*, 408 F.2d 1378 (8 Cir. 1969) cited at p. 35 of appellee's brief.

[9] §455. "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein."

require a triggering mechanism such as a motion to disqualify or an objection.

In *Kinnear-Weed Corporation* v. *Humble Oil & Refining Company*, 403 F.2d 437 (5 Cir. 1968), the Petitioner sought an extraordinary petition seeking to set aside the judgment of the Trial Court entered in 1956. The grounds were that the trial judge had a "substantial interest" within the meaning of Title 28, U.S.C. Section 455. The substantial interest allegedly was the judge's ownership of shares of the defendant corporation's stock. The Court of Appeals remanded the case to the District Court for findings on the issue of trial judge's "substantial interest" in the case. However, of relevance to the instant case is the fact that the respondent, Humble Oil, plead *res judicata* because the issue of disqualification had been raised in 1960-1961 and decided by the Court of Appeals. The Court of Appeals declined to accept Humble's plea and stated: ". . . this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake." *Kinnear-Weed Corporation, supra*, at pp. 439-440.

Kinnear-Weed involved questions of conflict of interest which are not alleged in the instant case. Here the issue involves the more subtle bias of *Murchison, Halliday* and *Mawson*. Even though the bias is more subtle, the purity of the judicial pocess is no less affected. It matters little to a defendant whether a judge's conclusions are frozen by self-interest or by a belief that his prior conclusions are right.

Conclusion

We submit that this issue will continue to present itself in the future. *Certiorari* should be granted because this

case affords a rare opportunity to give some uniformity to the most important objective of judicial objectivity.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1153

UNITED STATES OF AMERICA,

APPELLEE,

v.

ILARIO ZANNINO, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*, and
HAMLEY,* *Senior Circuit Judge*.

Joseph J. Balliro and *Francis J. DiMento*, with whom *DiMento & Sullivan*, *Balliro and Woodrow*, *Robert V. Mulkern*, *Fusaro & Fusaro*, and *Ronald J. Chisholm* were on briefs for appellants.

Edward F. Harrington, Special Attorney, Department of Justice, with whom *Joseph L. Tauro*, United States Attorney, and *Albert F. Cullen, Jr.*, Special Attorney, Department of Justice, were on brief, for appellee.

November 7, 1972.

McENTEE, *Circuit Judge*. Appellants Zannino, Balliro, Limone, and Strauss were convicted for transporting or aiding and abetting the transport of goods in interstate commerce knowing the same to have been stolen. Appellants filed a motion for new trial based upon newly discovered evidence. This motion was denied. In *United States* v. *Strauss*, 443 F.2d 986 (1st Cir.), *cert. denied*, 404 U.S. 851 (1971)[1] we affirmed this denial and the underlying

* Of the Ninth Circuit, sitting by designation.

[1] The underlying facts are set forth in detail in this opinion.

convictions. Shortly thereafter appellants filed a second motion for new trial based upon alleged additional newly discovered evidence. The trial court also denied this motion and these appeals follow.

This case stems from the robbery of a Boston jewelry store on March 24, 1966, by Erwin Soroko and Charles Lombardi. After the robbery Lombardi, Soroko, and his girl friend, Joanne, hid the jewelry in a New Hampshire cottage. Soroko was subsequently convicted in state court for his role in the robbery and in 1970 he pleaded guilty in federal court to interstate transportation of stolen jewelry.[2]

Soroko and Joanne were the government's chief witnesses in the instant case. At trial Soroko testified that on April 7, 1966, at "around 1 o'clock" in the afternoon he conferred with Balliro at the Intermission Lounge in Boston and offered him a share of the proceeds if he would find a buyer for the jewelry. Shortly thereafter Balliro told Soroko that Zannino was interested. Around 3:00 or 4:00 p.m. that same day Zannino and Limone came to the lounge and met with Soroko. Balliro was also present. They agreed that Zannino's appraiser, Strauss, would examine the merchandise and on April 8 Soroko, Balliro, and Strauss drove to the New Hampshire cottage. After brief negotiations, Strauss and Soroko reached an agreement on price and the threesome returned to Boston with the jewelry that afternoon. On this evidence the jury found the appellants guilty as charged.

Appellants' first motion for new trial was based upon a newly discovered notebook entry which placed the time of an April 7 meeting between Soroko, State Police Lieutenant James DeFuria and Boston Police Officers Timmons and Brooks at Murray Alpert's Buy-Rite market at

[2] The same trial judge who heard these cases accepted Soroko's plea and sentenced him.

3:30 p.m. This notation directly contradicted Soroko's testimony that he had been discussing the sale of the stolen goods with Zannino and Limone at the Intermission Lounge at that time. The evidence adduced at the hearing on this motion indicated that on April 7 DeFuria, Timmons, and Brooks travelled to the Buy-Rite market sometime after attending a morning hearing at the Boston Municipal Court involving Lombardi. Timmons, the owner of the notebook, did not recall whether he made the entry that afternoon or on the following morning. Only Lieutenant DeFuria independently recalled the incident and he testified that it occurred "anytime after 12 o'clock to 1:00, 1:30 at the latest." Soroko, as corroborated by Joanne, testified that they had arrived at the market between 11:00 and 11:30 that morning. He claimed to have spent fifteen to twenty minutes there and then to have made a fifteen to twenty minute drive to Joanne's home in Winthrop where she made lunch for her children. School records indicated that the children had returned to school by 12:45 p.m. On this evidence the court concluded that the notebook entry was inaccurate and denied the motion.

Appellants next filed the motion for new trial which is the subject of the instant appeal. The alleged newly discovered evidence which supports this motion is Lieutenant DeFuria's refreshed recollection of his activities of April 7. As he now remembers, he agrees with the notebook entry that the market incident occurred at approximately 3:30 p.m. His recollection is corroborated to some extent by that of Detective Sergeant Crowley.

At the hearing on this motion, DeFuria testified that his memory had been triggered by reading Crowley's name in his own testimony in the trial transcript.[3] As set forth

[3] In his affidavit DeFuria stated that his memory was refreshed by rereading the trial transcript, discussing the events of April 7 with Crowley, Zannino's attorney, and others, and by reviewing over and over again in his mind his activities on that day.

in his affidavit of November 16, 1971, DeFuria recalled the following events of April 7. He remembered leaving Boston Municipal Court with Crowley shortly after twelve noon, walking through downtown Boston to the Radar Restaurant, and Crowley declining his luncheon offer. After eating lunch, he recalled walking to Crowley's office in the District #2 police station. There Timmons and Brooks joined him and the three of them decided to interview Joanne and Alpert. They proceeded to Alpert's market in an unmarked car. Timmons and Brooks questioned Alpert for ten or fifteen minutes and after learning that Soroko was expected, returned to the car. There they waited "a good thirty minutes or more" until Soroko arrived. DeFuria also stated that he read the first three digits of Soroko's registration plate to Timmons as Soroko drove by.[4] Brooks interviewed Joanne for ten or fifteen minutes while Soroko was in the market. Thereafter the three officers lost Soroko's car in traffic. On these facts DeFuria concluded that the notebook entry fixing the time of the meeting at the market as 3:30 p.m. was accurate. Sergeant Crowley's affidavit corroborated DeFuria with regard to the walk from Municipal Court to the restaurant, his refusal to join DeFuria for lunch, the meeting in his office, and the subsequent departure of Timmons, Brooks, and DeFuria in an unmarked car.

On cross-examination DeFuria admitted that although his memory had been refreshed in February 1971, he did not reveal this to anyone for four months and then disclosed it only to defense counsel.[5] He also admitted that he had attempted to refresh Crowley's memory at the insistence of Attorney DiMento who represented the appel-

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[4] DeFuria admitted on cross-examination that this statement was incorrect. He testified that he read the plate numbers to Timmons as Soroko *departed* from the market.

[5] He explained this unusual conduct by claiming that he feared "repercussions" if he changed his testimony.

lant Zannino. The government introduced a witness fee list[6] for April 7, 1966, which included DeFuria's signature and thus demonstrated that, contrary to his affidavit, he had collected a witness fee at some time on the day in question. DeFuria initially stated that he had no recollection of this event. After a brief court recess, however, he claimed that he now recalled this event and proceeded to testify about it in great detail. The government also produced a semi-monthly report in which DeFuria claimed supper expenses for June 18, 1971, an evening on which he admitted Attorney DiMento had purchased his dinner for him. In addition, a number of discrepancies came to light between what he recalled at the instant hearing and a statement he had given to the FBI in October 1971. Sergeant Crowley testified on cross-examination that he had "partial recall" of the events of April 7, but his testimony demonstrated that he had no memory of the events other than those which DeFuria had discussed with him.[7]

Appellants' primary contention is that, in light of DeFuria's refreshed recollection, Soroko's testimony regarding the events which he claimed took place between 11:00 a.m. and 12:45 p.m. on April 7 could not possibly have been true because it would be impossible for all of the events which he and the police officers described to have occurred within a one hour and forty-five minute period.[8]

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[6] State police officers who appear as witnesses in cases in municipal court are paid a fee for their appearance. They receive a witness chit and are required to sign a witness fee list when they cash this chit at the Boston City Hall Annex.

[7] Crowley had not been called to testify at the hearing on the first motion for new trial because he had stated that he did not remember the events in issue at that time.

[8] Appellants' argument may be set forth more fully as follows: accepting 11:00 a.m. (Soroko's claimed time of arrival at the market) and 12:45 p.m. (the time when the children returned to school) as the two crucial times, it is simply impossible for all of the following events to have occurred in the interim — the walk to City Hall, DeFuria's receipt of his witness fee, the walk to the Radar Restaurant,

In addition, appellants again raise the question of the possible accuracy of the 3:30 p.m. notebook entry.[9] The overriding thrust of these arguments is, of course, that if this evidence had been introduced at trial it might have cast some doubt on Soroko's credibility.

The trial court, however, chose not to believe the refreshed recollection of DeFuria and Crowley. In denying the motion, it made the following findings: (1) that the officers' refreshed recollection was not a real one but a reconstruction of what might have happened if the 3:30 p.m. notebook entry were accurate; (2) that the facts testified to by the officers did not prove that Soroko had testified falsely when he described the meetings in the lounge on April 7, 1966; and (3) that refreshed recollection under these circumstances did not constitute newly discovered evidence.[10]

DeFuria's lunch, the walk from the restaurant to Crowley's office, the wait for Brooks and Timmons to arrive, the drive to the market, the interview with Alpert, the wait for Soroko's arrival, the interview of Joanne while Soroko was in the market, Soroko's drive to Winthrop, the preparation and consumption of the children's lunch, and the children's return to school.

[9] Appellants called Officer Brooks who testified that on April 7 he observed Timmons writing in his notebook when he returned to the car after interviewing Joanne. This contention has been deemphasized on appeal.

[10] Both parties have briefed and argued the question of whether a refreshed recollection may constitute newly discovered evidence. Although no cases which stand for this proposition have been cited, and we have not discovered any, appellants urge our adoption of this position based on an analogy to the recanting witness cases. While we are inclined to agree with the trial court's resolution of this issue, our disposition of this appeal does not require us to confront this difficult espitemological question. We note in passing, however, that even if we were to treat this recollection as newly discovered evidence our disposition would be the same. Under the traditional tests for newly discovered evidence set forth in *Strauss*, *supra* at 989-90, a new trial would not be warranted because the evidence supports the trial court's findings with regard to the credibility of the officers' revised testimony and the court's finding that the revised testimony did not prove that Soroko had testified falsely when he described the April 7 meeting at the lounge.

The question on appeal is whether the court abused its discretion in denying appellants' second motion. As we said in *United States* v. *Leach,* 427 F.2d 1107, 1111 (1st Cir.), *cert. denied,* 400 U.S. 829 (1970), "[m]otions for new trial are directed to the trial court's discretion. Under its broad power, the court may weigh the evidence and consider the credibility of the witnesses. The remedy is sparingly used. . . ." In light of DeFuria's proven penchant for reconstruction, the documentary evidence (the witness fee list) which contradicted his affidavit, the inconsistencies between his sworn statement and his statement to the FBI, and the fact that Crowley had no memory of any of the events of April 7 other than those which DeFuria had discussed with him, we find that the evidence supports the court's conclusion as to the officers' lack of credibility. Therefore, we conclude that no abuse of discretion occurred in the denial of the motion.

Little need be said with regard to appellants' contention that the government intentionally suppressed the witness fee list in violation of the due process requirements of *Giglio* v. *United States,* 405 U.S. 150 (1972) and *Brady* v. *Maryland,* 373 U.S. 83 (1963). The argument that the fee lists might have been used at the hearing on the first motion to refresh DeFuria's memory is without merit since DeFuria had been excused before the fee lists came to the attention of the government.[11] Since the inquiry at that hearing was directed toward finding "time-stamped" documents which would indicate when the officers left Municipal Court, the lists had little probative value since they contain no notation of time of payment. The relevance of these lists to the second motion became apparent only when DeFuria revised his testimony. Obviously the gov-

[11] DeFuria was excused on December 7, 1970. The government became aware of the fee lists on December 10, 1970.

ernment cannot be faulted for failing to anticipate this change in his testimony.

Appellant's final contention is that the trial judge erred in failing to disqualify himself from hearing the instant motion. The appellants argue that the judge made certain findings which are contrary to facts urged in support of the instant motion when, at earlier proceedings, he accepted Soroko's guilty plea and denied appellants' first motion for new trial. The court found, pursuant to Local Rule 8(i),[12] that a hearing before it would result in a substantial saving of time and that there was no reason why in the interest of justice the hearing should be conducted before another judge.

We note that appellants' reliance upon *Halliday* v. *United States,* 380 F.2d 270, 272-74 (1st Cir. 1967), *aff'd on other grounds,* 394 U.S. 831 (1969), is somewhat misplaced. In *Halliday* the same trial judge presided at two separate proceedings involving the defendant; he accepted defendant's guilty plea and sat in judgment on his § 2255 petition. However, as we said in that case, "[i]n the continuation of a single proceeding, *as on a motion for new trial,* important considerations suggest that the hearing should be before the original judge." (Emphasis added.) *Id.* at 272. One of these important considerations, the saving of court time, has particular application to a motion for new trial which, like the instant motion, raises espe-

[12] Local Rule 8(i) provides: "When an appellate court remands a case to this court for a new trial, the case shall be reassigned to a judge other than the judge before whom the first trial was held. In all other cases in which the mandate of the appellate court requires further proceedings in this court, such proceedings shall not be conducted before the judge before whom the prior proceedings were conducted unless he determines that there will result a substantial saving in the time of the whole court and that there is no reason why in the interest of justice, further proceedings should be conducted before another judge. If the judge before whom the prior proceedings were conducted does not retain the case for further proceedings, he shall return it to the clerk for reassignment."

cially complex factual questions. In addition, unlike *Halliday* where the defendant expressly requested that his § 2255 petition be heard before a different judge, appellants raised no objection until this appeal to the court's failure to refer the instant motion to another judge. This belated objection belies appellants' claim of prejudice. *See Goldfine* v. *United States*, 268 F.2d 941 (1st Cir. 1959), *cert. denied*, 363 U.S. 842 (1960).

Turning to appellants' specific claims of prejudice, we note first that the trial judge resolved no issues which bore upon the instant motion when he accepted Soroko's plea and sentenced him. The issue there was whether Soroko understood the nature of his guilty plea, not whether the refreshed recollection of DeFuria and Crowley were credible. In denying the first motion for new trial, the court found that the April 7 entry in Timmons' notebook had been made in two separate installments and that the second part of the entry which included the 3:30 p.m. notation had been made sometime after the day in question.[13] Again, this finding does not conflict significantly with appellants' present contention that Soroko's testimony is incredible in light of the police officers' revised testimony.[14] At the hearing on this motion, however, appellants also reasserted their earlier contention that the 3:30 p.m. notebook entry was accurate.[15] Officer Brooks testified that on April 7 when he returned to the car after questioning Joanne he noticed Timmons writing in his

[13] The court found that the April 7 entry had been written with two different pens and, in view of the difference in the quality of the handwriting in the two installments, concluded that the installments had been made at two different times.

[14] We recognize that the trial court's earlier finding that the 3:30 p.m. entry was inaccurate does conflict with the ultimate conclusion expressed in DeFuria's affidavit that the meeting at the market took place around 3:30 p.m. We do not deem this conflict significant enough to warrant ordering a new trial in light of the other inconsistencies inherent in DeFuria's testimony.

[15] *See* note 9, *supra*.

notebook. While this evidence would appear to conflict with the court's earlier finding, it is in fact not inconsistent with it since Brooks may have observed Timmons writing the first part of the entry, which could well have been made while the officers were at the market. For these reasons we find appellants' claim of prejudice to be without merit.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 72-1153.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ILARIO ZANNINO ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered: November 7, 1972

This cause came on to be heard on appeal from the United District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc. Messrs. DiMento, Balliro, Mulkern and Harrington.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL No. 70-133-G
CRIMINAL No. 70-317-G

UNITED STATES OF AMERICA

v.

ILARIO ZANNINO ET AL.

MEMORANDUM OF DECISION DENYING SECOND MOTION FOR A NEW TRIAL

May 9, 1972

GARRITY, J. The defendants filed a second motion for a new trial on the ground of newly discovered evidence originally on the basis of an affidavit of defense attorney DiMento reciting the refreshed recollection of State Police Detective DeFuria and Boston Police Sergeant Crowley. After an order of the court of Appeals pointing out the hearsay nature of the attorney's affidavit, the motion was supplemented by affidavits of the two officers. By further order of the Court of Appeals the motion was referred to this court. Evidentiary hearings were held at which the two officers and several other witnesses testified and the parties filed briefs.

The newly discovered evidence is mainly that DeFuria now agrees (and Crowley in effect agrees) with the entry in Officer Timmons' "filler" that Soroko was at a meat market at 118 Blackstone Street, Boston, at about 3:30 P.M. on April 7, 1966, contrary to Soroko's testimony at the trial that at that time he was engaged in incriminating conversations with some of the defendants at the Intermission Lounge in another section of the city. The factual background is set forth in detail in the opinion of the

Court of Appeals, *United States* v. *Strauss*, 1 Cir., 1971, 443 F.2d 986, in which the court's denial of the defendants' first motion for a new trial was affirmed, and in the court's memorandum of decision dated January 11, 1971.

Upon analysis of the evidence offered in support of the latest motion, it too is denied because (1) the officers' refreshed recollection is not real recollection but a reconstruction of what would have happened if Timmons' "filler" entry were accurate, (2) the facts testified to by the officers do not prove that the key government witness Soroko testified falsely when he described the meetings in the Intermission Lounge on April 7, 1966 and (3) refreshed recollection under the circumstances here presented does not constitute newly discovered evidence. Basically, the court disbelieves the revised testimony of DeFuria and the adoptive testimony of Crowley. See *United States* v. *Crandall*, 1 Cir., 1972, 453 F.2d 1216.

Regarding DeFuria, (1) the fact which assertedly triggered his refreshed recollection, viz., Crowley's having been the prosecuting officer in the Lombardi proceeding in the Boston Municipal Court on April 7, was known to him at the time of his testimony on the first motion; (2) he did not reveal his new memory to anyone until four months after he arrived at it and then only to defense counsel; (3) his refreshed recollection was contradicted by documentary evidence, in that he thrice described in detail his actions after leaving the Boston Municipal Court without recalling having stopped at the City Hall Annex after leaving court to collect a witness fee; (4) when shown documentary proof of this event, and after a court recess, he described the incident in detail; (5) the exhibit from City Hall also showed him to be probably erroneous in another respect in that it showed that Timmons collected a witness fee soon after he did, casting doubt upon his testimony that Timmons had remained at the Boston Municipal

Courthouse; (6) his own diary and official semimonthly report both stated that he went from the courthouse to the meat market and then to police station No. 2, rather than first to the station and then to the meat market as he testified; (7) he was prone to reconstruct, in that (a) while stationed at the Suffolk Downs racetrack in East Boston in June 1971 he claimed and received payment from the Commonwealth for having supper there each evening (at the direction of his superior officer, he testified), whereas it developed that on June 18, 1971 Attorney DiMento took him to dinner in a downtown restaurant, (b) according to Mr. DiMento's affidavit, on the basis of a conversation with Soroko before or during the trial, DeFuria accepted Soroko's memory rather than his own as to the time of the episode at the meat market;[1] and (8) his testimony was at times at variance with an interview he had had with FBI Agent Irvin following the filing of Attorney DiMento's affidavit and before the filing of his own.[2]

Regarding Crowley, (1) he was available as a witness at the hearing on the first motion for a new trial, but neither party called him because he had no recollection of the events at issue; (2) his recollection was revived by DeFuria at Attorney DiMento's request and, generally, he

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[1] DeFuria's statement, quoted in Attorney DiMento's affidavit, was subtly misleading, implying that his testimony on the first motion for a new trial, fixing 12:00 to 12:30 as the crucial time, was based on a conversation with Soroko. In his testimony, however, DeFuria admitted that he had stated the same time, 12:00 to 12:30, to Government counsel prior to the trial and before his conversation with Soroko (and, incidentally, that Timmons had agreed with this estimate).

[2] Defendants have argued that the inclusion in DeFuria's refreshed recollection of such incidental facts as the type of clothing he and Crowley were wearing, where he sat at the lunch counter, the subject matters of casual conversations, etc., somehow corroborate his memory on essential points. The court disagrees. If anything, they detract from his credibility. The events occurred over five years ago and were routine in the working day of a detective. Also, none of the incidentals are susceptible of verification.

remembered only what DeFuria reminded him of and made the same errors and recoveries, e.g., the stop at the City Hall Annex while DeFuria collected a witness fee, as did DeFuria; (3) when asked about events in April 1966 other than the precise points discussed with DeFuria, he had no memory at all.

In sum, the court believes and finds that, but for Timmons' "filler" and the affirmance of the defendants' convictions, DeFuria and Crowley would never have restructured their recollections as they did. However, given Timmons' filler entry of "about 3:30 P.M." as the time of the meat market episode, they figured that what must have happened were the events they recounted to Attorney DiMento. Therefore the court has reexamined Timmons' notebook and reconsidered its earlier finding that the time entry was mistaken. The court reaffirms its finding last year and further finds that the thin-lined purplish-inked entries under April 7, 1966 (as distinguished from the heavier, blue-inked entries on the first five lines) were made on the following day or, having in mind that blank pages and almost blank pages appear elsewhere in the notebook, perhaps many days after entry of the first five lines.[3]

Moreover, even if the refreshed recollections of DeFuria and Crowley are true, it does not follow that Soroko was falsifying when he described the meeting at the Intermission Lounge. The statement in DeFuria's affidavit that he is convinced that Timmons' entry of 3:30 P.M. is correct, is only his conclusion based upon the time intervals which he estimates would have been required to do the things he now says were done. But at the hearing, he testified that he did not recall any exact times on April 7, 1966 and was

[3] Officer Brooks was recalled and also enlarged on his testimony at the hearing on the first motion for a new trial, by stating that while parked near the meat market he saw Timmons writing in his notebook. But this may have been the blue-inked entries under April 7 or even the blue-inked entries for April 6.

giving only "rough, rough estimates." Mindful of the observation in the opinion of the Court of Appeals, p. 990, n. 5, "even if Soroko had not arrived at the Intermission Lounge until 2:00, there was ample time...", the court finds that the events described by DeFuria in his testimony might well have consumed much less time than he roughly estimated.

Finally, the expanded recollection of DeFuria is not newly discovered evidence. There is nothing that he testified to on the second motion for a new trial that, but for his memory improving with the passage of time, he couldn't have testified to at the hearings on the first motion. The significance of the matters about which he testified did not change in the interim. The defendants in their briefs have cited no case indicating that improved recollection constitutes newly discovered evidence. Crowley's testimony stands on an even weaker footing. He recalled nothing material in 1970 at the time of the first set of hearings, so much so that neither side even called him as a witness.

Defendants have advanced two other arguments in support of their motion. The first is predicated upon DeFuria's pregnant testimony just before it concluded, that at the pretrial conference at which he and Timmons told the prosecuting attorney that the meat market incident occurred at 12:00 or 12:30 P.M., Timmons said to DeFuria in the presence of the prosecutor, "If I had my notebook, I could be more sure," but nobody asked him to get the notebook.[4] The argument is that by failing to pursue the matter or to advise defense counsel, the prosecutor concealed potentially exculpatory evidence, in violation of *Brady* v. *Maryland,* 1963, 373 U.S. 83, and *Giles* v. *Mary-*

[4] A subtle distinction might be made here, in that a statement in one's presence is not necessarily within one's hearing nor, even if within one's hearing, always heard and understood. However, the court does not rely on such fine points.

land, 1967, 386 U.S. 66. Under the circumstances, the court finds that Timmons never made the statement attributed to him because (a) DeFuria had testified at length at two sets of hearings and made no previous mention of any such statement by Timmons; (b) no such assertion was made in either DeFuria's or Attorney DiMento's affidavit filed in support of the second motion, although its significance would have been obvious; (c) Timmons was available to testify on the point and the defendants never called him; and (d) when DeFuria gave that particular sentence in his testimony, his voice and inflection changed in such a manner as to indicate to the court a consciousness of, say, embellishment.

The other defense argument is that, toward the conclusion of the hearings on the first motion for a new trial, government counsel intentionally suppressed the lists of witness fees paid at the City Hall Annex on which the names of the officers appeared as of April 7, 1966. Here the defendants are clutching at straws. Maintenance of such records was as well known to defense counsel as to government counsel; DeFuria had been excused as a witness; at the court's request, counsel were seeking documents which were "time-stamped" and which would indicate the hour when the Lombardi hearing in the Boston Municipal Court had concluded; the witness lists had no times of day stamped or otherwise noted on them. Furthermore, government counsel had no reason to anticipate that DeFuria would testify more than a year later, forgetful of his having collected a witness fee after court that day, and that the lists would become highly relevant to his credibility.

In ruling upon defendants' second motion for a new trial, the court is mindful of the various principles and precedents stated in its memorandum of decision dated

January 11, 1971 and the traditional tests discussed in *United States* v. *Strauss, supra* at 989-990, and in *United States* v. *Crandall, supra*. Under all tests the motion is denied.

(s) W. Arthur Garrity, Jr.
United States District Judge